

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/697,225
Inventor(s) : Mary Elizabeth Davis, et al.
Filed : October 30, 2003
Art Unit : 3761
Examiner : Ginger T. Chapman
Docket No. : 9396L
Confirmation No. : 9781
Customer No. : 27752
Title : Disposable Absorbent Article Having A Visibly
Highlighted Wetness Sensation Member

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

This Brief is filed pursuant to the appeal from the decision communicated in the Office Action mailed on June 22, 2009.

A timely Notice of Appeal was filed on September 21, 2009.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

Claims 7 to 12 are rejected.

Claims 7 to 12 are appealed.

A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

STATUS OF AMENDMENTS

No amendment was filed.

SUMMARY OF CLAIMED SUBJECT MATTER

Claim 7 is the only pending independent claim. Claim 7 recites a disposable absorbent article for wearing about a lower torso of a wearer and having a longitudinal axis (page 6, line 29 and reference number 42). The disposable absorbent article has two laterally opposed article side edges extending between a laterally extending first waist end edge in a first waist region (reference number 36) and a laterally extending second waist end edge in a second waist region (reference number 38), and a crotch region interposed therebetween (page 6, lines 29-34).

The disposable absorbent article comprises a backsheet (page 7, lines 3-4 and reference number 26), a topsheet joined to the backsheet and having a body-facing surface (page 7, lines 3-9 and reference number 24), and an absorbent core disposed intermediate the backsheet and the topsheet (page 7, lines 3-4 and reference number 28). The disposable absorbent article comprises at least one wetness sensation member (reference number 50) disposed upon the topsheet (reference number 24) in a face-to-face arrangement with the permeable body-facing layer (reference number 52) and having two laterally opposed side edges, at least a portion of each of the two wetness sensation member side edges being disposed laterally inwardly of the article side edges (page 7, lines 16-21 and page 9, lines 1-3).

The disposable absorbent article comprises a visible highlighting (reference number 200) indicating a presence of the wetness sensation member in the disposable absorbent article and being visible at least when viewing the body-facing surface of the topsheet to facilitate an opportunity for urinary toilet training of the wearer (page 7, line 35 to page 8, line 15). The visible highlighting comprises an ink-printed pattern made up of a plurality of repeating figures (page 9, lines 26-27 and page 11, lines 14 to 29).

The ink-printed pattern is visible prior to wetting of the wetness sensation member (page 9, lines 1-20). The appearance of the visible highlighting is substantially unchanged upon wetting of the wetness sensation member (page 13, lines 14-16).

Urine deposited by the wearer onto the wetness sensation member can penetrate through the permeable body-facing layer in a z direction away from the wearer to the absorbent core (page 7, lines 22-28). The wetness sensation member retards the passage

of urine in the z direction and supports the movement of the urine in an x-y plane such that the wearer's awareness of urination is enhanced (page 7, lines 22-28).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

I. Whether the rejection of Claims 7-9 as unpatentable under 35 U.S.C. §103(a) over Otsubo, U.S. Patent No. 6,146,367, in view of Neading, U.S. Patent Application Publication No. 2001/0049513, is erroneous.

II. Whether the rejection of Claims 10-12 as unpatentable under 35 U.S.C. §103(a) over Otsubo, U.S. Patent No. 6,146,367, in view of Neading, U.S. Patent Application Publication No. 2001/0049513, and further in view of Roe, U.S. Patent No. 6,642,427, is erroneous.

ARGUMENTS

I. The rejection of Claims 7-9 as unpatentable under 35 U.S.C. §103(a) over Otsubo, U.S. Patent No. 6,146,367, in view of Neading, U.S. Patent Application Publication No. 2001/0049513, is erroneous because the asserted combination does not teach or suggest every element of the claims, and there was no apparent reason to combine and further modify the references in the fashion claimed.

Every element of a claim must be considered in assessing the patentability of that claim. MPEP § 2143.03 (citing *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970)). The obviousness inquiry requires a determination of “whether there was an apparent reason to combine the known elements in the fashion claimed To facilitate review, this analysis should be made explicit.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (citations omitted) (emphasis added). “If [a] proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed

modification.” MPEP §2143.01(V) (citing *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984)).

Independent Claim 7 recites visible highlighting of a wetness sensation member comprising an ink-printed pattern made up of a plurality of repeating figures, wherein the ink-printed pattern is visible prior to wetting of the wetness sensation member, and wherein the appearance of the visible highlighting is substantially unchanged upon wetting the wetness sensation member. The Office Action asserts that Otsubo teaches a wetness sensation member having visible highlighting, and that Nearing teaches a visible highlighting comprising an ink-printed pattern that is visible prior to wetting. Office Action at pages 5-6.

The Office Action does not address the recitation of Claim 7 that “the appearance of the visible highlighting is substantially unchanged upon wetting of the wetness sensation member”. Accordingly, the Office Action does not address every element of the claims, and does not provide an apparent reason for combining and further modifying the cited references in the fashion claimed. As such, the Office Action does not make out a *prima facie* case of obviousness with regard to Claim 7.

Further, Nearing does not support a *prima facie* case of obviousness because modifying Nearing such that the visible highlighting is substantially unchanged upon wetting would render the invention of Nearing unfit for its intended purpose. As the Office Action acknowledges, the mark (interpreted as visible highlighting) of Nearing is used to indicate “that urination and soiling of the diaper has taken place.” Office Action at page 6. If the mark of Nearing was substantially unchanged upon wetting, the mark would no longer indicate when the article had been soiled, and, thus, would not serve its intended purpose. As such, the proposed modification of Nearing is improper and does not support a *prima facie* case of obviousness with regard to Claim 7.

Claims 8 and 9 depend from Claim 7, and, therefore, include all the elements of Claim 7. Thus, Claims 8 and 9 are believed to be patentable over the asserted combination of Otsubo and Nearing for at least the same reasons as Claim 7.

Further, Claim 8 recites a plurality of wetness sensation members. The Office Action asserts that Otsubo discloses a wetness sensation member comprising a plurality

of crests, which performs in a substantially identical manner as a plurality of members in the same configuration. Office Action at page 8. This rationale is flawed because it confuses the effect of the different structures with the structures themselves. Even if the plurality of crests of Otsubo provided the same benefits as the plurality of wetness sensation members of Claim 8, which is expressly not admitted to, the structures are not the same, and the Office Action does not set forth any reason why the structure of Otsubo suggests the structure of Claim 8.

Still further, the plurality of crests in Otsubo do not provide the same functionality as the plurality of wetness sensation members in Claim 8. The plurality of crests in Otsubo are disposed on a single wetness retaining sheet. *See* Otsubo at Col. 3, line 51 to Col. 4, line 31. The plurality of crests function to retain urine in the troughs between the crests, preventing the urine from running out of the wetness retaining sheet. Otsubo at Col. 5, lines 54-65. In contrast, the distinct wetness sensation members of Claim 8 are spaced apart from the longitudinal axis and spaced apart from one another. The space between the wetness sensation members of Claim 8 allows liquid to pass through to the core so as to prevent flooding that can result in leakage of the absorbent article during urination. Specification at page 17, lines 4-8. As such, the plurality of crests in Otsubo function to retain urine, whereas the plurality of wetness sensation members in Claim 8 allow liquid to pass through to the core. Thus, the structures of Otsubo and Claim 8 do not perform in the substantially identical manner, as asserted in the Office Action.

Thus, the Office Action does not provide an apparent reason to modify the plurality of crests of Otsubo in the fashion claimed, and, therefore, the rejection of Claim 8 is erroneous. Indeed, modification of the plurality of crests to achieve the structure of Claim 8 seems likely to alter the principle of operation of the crests, or to make the plurality of crests unsuitable for their intended purpose.

With regard to Claim 9, the Office Action asserts that the spacing of the plurality of crests in Otsubo provides motivation for spacing the plurality of wetness sensation members of Claim 9. Office Action at page 8. However, as discussed above with respect to Claim 8, the plurality of crests in Otsubo do not have the same structure or function as the plurality of wetness sensation members of Claims 8 and 9. As such, there is no

apparent reason to adopt and modify the structure of Otsubo in the fashion claimed in Claim 9. Thus, the rejection of Claim 9 is erroneous.

In view of all of the above, it is respectfully submitted that the rejection of Claims 7-9 under 35 U.S.C. §103(a) over Otsubo in view of Neading is erroneous and should be reversed.

- II. The rejection of Claims 10-12 as unpatentable under 35 U.S.C. §103(a) over Otsubo, U.S. Patent No. 6,146,367, in view of Neading, U.S. Patent Application Publication No. 2001/0049513, and further in view of Roe, U.S. Patent No. 6,642,427, is erroneous because the asserted combination does not teach or suggest every element of the claims, and there was no apparent reason to combine and further modify the references in the fashion claimed.

Claims 10-12 depend from Claim 7, and, therefore, include all the elements of Claim 7. Thus, Claims 10-12 are believed to be patentable over the combination of Otsubo and Neading for at least the same reasons discussed above in regard to Claim 7.

Roe is cited as teaching a topsheet comprising two z-folds parallel to the longitudinal axis, with a wetness sensation member disposed in one of the two z-folds. Office Action at page 9. This teaching does not cure the defects of Otsubo and Neading, as discussed above. Thus, the asserted combination does not teach or suggest every claim element, and the Office Action does not set forth an apparent reason to combine and further modify the references in the fashion claimed.

As such, the rejection of Claims 10-12 under 35 U.S.C. §103(a) over Otsubo in view of Neading and further in view of Roe is erroneous and should be reversed.

SUMMARY

In view of all of the above, it is respectfully submitted that the rejections of Claims 7-9 and 10-12 are erroneous and should be reversed.

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Respectfully submitted,
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(Appeal Brief.doc)
Revised 2/12/09

CLAIMS APPENDIX

7. A disposable absorbent article for wearing about a lower torso of a wearer and having a longitudinal axis, two laterally opposed article side edges extending between a laterally extending first waist end edge in a first waist region and a laterally extending second waist end edge in a second waist region, and a crotch region interposed therebetween, the disposable absorbent article comprising:
- a backsheet;
 - a topsheet joined to the backsheet and having a body-facing surface;
 - an absorbent core disposed intermediate the backsheet and the topsheet;
 - at least one wetness sensation member disposed upon the topsheet in a face-to-face arrangement with the permeable body-facing layer and having two laterally opposed side edges, at least a portion of each of the two wetness sensation member side edges being disposed laterally inwardly of the article side edges; and
 - a visible highlighting indicating a presence of the wetness sensation member in the disposable absorbent article and being visible at least when viewing the body-facing surface of the topsheet to facilitate an opportunity for urinary toilet training of the wearer wherein said visible highlighting comprises an ink-printed pattern made up of a plurality of repeating figures and wherein said ink-printed pattern is visible prior to wetting of the wetness sensation member, and wherein the appearance of the visible highlighting is substantially unchanged upon wetting of the wetness sensation member,

wherein urine deposited by the wearer onto the wetness sensation member can penetrate through the permeable body-facing layer in a z direction away from the wearer to the absorbent core and the wetness sensation member retards the passage of the urine in the z direction and supports the movement of the urine in an x-y plane such that the wearer's awareness of urination is enhanced.

8. The disposable absorbent article of Claim 7 comprising a plurality of the wetness sensation members disposed parallel to and spaced apart from the longitudinal axis and spaced apart from one another, each of the wetness sensation members being disposed upon the topsheet.
9. The disposable absorbent article of Claim 8 wherein the plurality of wetness sensation members are separated from one another by a spacing ranging from about 5 mm to about 15 mm.
10. The disposable absorbent article of Claim 8 wherein the topsheet comprises two Z-folds parallel to the longitudinal axis and each of the wetness sensation members is disposed within a respective one of the two Z-folds.
11. The disposable absorbent article of Claim 10 wherein the two Z-folds are separated by a spacing ranging from about 50 mm to about 90 mm.

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12. The disposable absorbent article of Claim 10 wherein the two Z-folds further comprise two elastic members disposed along the two flow control layers.

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EVIDENCE APPENDIX

None.

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RELATED PROCEEDINGS APPENDIX

None.